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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Felipe Martinez

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109 7590 06/04/2009

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EXAMINER

YAGER, JAMES C

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

06/04/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## **ATTACHMENT TO ADVISORY ACTION**

### ***Response to Amendment***

1. The amendment filed 28 May 2009 has been entered. In light of the amendments to the claims, all prior rejections under 35 U.S.C. §112, second paragraph, have been withdrawn.

### ***Response to Arguments***

2. Applicant's arguments filed 28 May 2009 have been fully considered but they are not persuasive.

Applicant argues that claim 8 further limits the subject matter of claim 1 because claim 8 contains all of the limitations of claim 1 and therefore has an upper limit of 90 percent LLDPE.

Examiner's position remains that claim 8 is broader than claim 1 given that there is no upper limit on the amount of LLDPE in claim 8. If applicant amends claim 8 to recite 50-90 percent by weight of LLDPE, the objection would be overcome.

Applicant argues that the claims themselves provide a clear indication of what the basic and novel characteristics of the present invention are and that the language "consisting essentially of" in the claims distinguishes the instant invention from inventions including a non-foamed layer.

It is the Examiner's position that Applicant has still not shown that non-foamed layers would materially affect the basic and novel characteristics of the invention.

Applicant argues that the instantly claimed films do not need the support provided by non-foamed layers.

However, it is noted that "the arguments of counsel cannot take the place of evidence in the record", *In re Schulze*, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965). It is the examiner's position that the arguments provided by the applicant regarding whether the instantly claimed films do not need the support provided by non-foamed layers must be supported by a declaration or affidavit. As set forth in MPEP 716.02(g), "the reason for requiring evidence in a declaration or affidavit form is to obtain the assurances that any statements or representations made are correct, as provided by 35 U.S.C. 24 and 18 U.S.C. 1001".

Applicant argues that it is clear that "consisting essentially of" is meant to exclude non-foamed layers, and should be given ordinary meaning.

It is noted that the examiner is giving "consisting essentially of" its ordinary meaning, which narrows the claims to the specified materials and those which do not materially affect the basic and novel characteristics of the claimed invention. Given that Applicant has not provided any evidence that the non-foamed layer would materially affect the basic and novel characteristics of the invention, Examiner's position remains that "consisting essentially of" must be construed as equivalent to comprising.

***Conclusion***

3. Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES YAGER whose telephone number is (571)270-3880. The examiner can normally be reached on Mon - Fri, 7:30am-5pm, EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on 571 272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

JY 6/1/09

/Rena L. Dye/  
Supervisory Patent Examiner, Art Unit 1794